Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-817

DONALD EVERETT D.,
DENNIS LOUIS D.,

Petitioners,

v.

THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA, THIRD APPELLATE DISTRICT

BRIEF IN REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUIN DENVIR,
State Public Defender of California

EZRA HENDON
Chief Assistant State Public Defender

LAURANCE S. SMITH
Deputy State Public Defender

455 Capitol Mall, Suite 360
Sacramento, California 95814
Telephone: (916) 322-5298

Attorneys for Petitioners

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RESPONDENT ARGUES THAT EVERY TRIER OF FACT MAY MEASURE THE SIZE OF A "REASONABLE" DOUBT FOR HIMSELF IN AS ERRATIC A MANNER AS HE DESIRES, AND THAT SUCH MEASUREMENT SHOULD BE INSULATED FROM ALL REVIEW

In his response to the petition, respondent asserts baldly that the right to proof of guilt beyond a reasonable doubt is a right whose application and enforcement is within the "exclusive province of the trier of fact". (Resp. pp. 14-15; emphasis in original.) In making this assertion, for which no germane authority is cited, respondent begs the precise question which we have asked the Court to decide.

Respondent seeks support for his position in decisions of this Court which have defined the standard applied by this Court for its review of facts, e.g., Thompson v. Louisville (1960) 362 U.S. 199. But this Court, as a national court of policy, obviously could not undertake substantive review of the sufficiency of evidence in every state criminal case even if it were inclined to do so. "[A] court of law, such as this Court is,

rather than a court for correction of errors in factfinding, cannot undertake to review . . . findings of fact. . . ." (Graver Manufacturing Co. v. Linde (1949) 336 U.S. 271, 275.)

Respondent would have it follow from the limitations which necessity has forced this Court to impose upon the scope of its own review of facts that there should be no review of facts at all. He thus purposefully ignores a distinction which we were careful to draw (Pet. p. 17, n. 11) between the proper role of this Court and that of a first-level, non-discretionary appellate court. The Court has noted in the past that review of a whole record for substantial evidence is a task properly within the keeping of the Courts of Appeal (Mobil Oil Corp. v. F.P.C. (1974) 417 U.S. 283, 310) but has not as yet directly taken up the important question of whether that task is not a fortiori within the keeping - and the duty - of such courts when they undertake review of a criminal conviction.

The very definition of the word "reasonable" as an objective rather that /

subjective concept[1] belies respondent's position that the size of a reasonable doubt may be made to vary as the length of the trier of fact's foot, and that not even review for clear failure to establish guilt beyond a reasonable doubt is required. (cf. Burks v. United States (1978) 437 U.S. 1, 17; King v. United States (App. D.C. 1967) 372 F.2d 389.) For, as Felix Frankfurter pointed out long ago, "Discretion without a criterion for its excercise is authorization of arbitrariness". (Brown v. Allen (1953) 344 U.S. 443, 496.)

It can be seen from examination of the instant record that the refusal of California reviewing courts to do more then look for the first scintilla of inculpatory evidence, and their failure to recognize the existence of anything to the contrary, leads exactly to the kind of arbitrariness on the trial level whereby inculpatory testimony is accepted

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1. Webster's 3rd New International Dictionary (1971) p. 1892, defines "reasonable" as: "Being in agreement with right thinking, right judgment -- not extreme, not excessive. . . ."

if it is not "inherently unreasonable", exculpatory evidence is not "carefully dissected", and decisions are made on the basis of a "personal opinion" which is supported by no evidence at all.[2] (Pet. App. "B".)

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2. We do not disagree with respondent's statement of the law that statements of opinion are permissible where "based upon inferences fairly drawn from a consideration of the evidence produced at trial". (Resp. pp. 23-24.) While the evidence here does show that the complaining witness was of slight build and on his way to a homosexual bar, it fails to contain any suggestion that petitioners had a propensity to rob or to engage in unprovoked acts of violence against such individuals. The juvenile court's statement to this effect is thus rank speculation, and does not constitute an acceptable basis for resolution of the conflicts in the testimony.

In conclusion it can be seen that review according to a standard of "any evidence" creates an impermissible risk that trials themselves will be conducted according to the same standard; the moral force of the law will thus be diluted by the resultant uncertainty as to whether innocent men are being condemned.

(In re Winship (1970) 397 U.S. 358, 363-364.)[3]

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3. In this context, it may be worth recalling the very grave dilution of the law's moral force which resulted from an appellate court in Massachussetts' refusal to examine the evidence in the ill-starred case of Sacco and Vanzetti. (Commonwealth v. Sacco (1927) 261 Mass. 12, 17; compare, e.g., R. Feuerlicht, Justice Crucified (1977) p. 211.

II

CALIFORNIA MAINTAINS THAT REFEREES ARE "FACTFINDERS" TO SUIT ITS PURPOSES HERE, BUT "SUBORDINATES" TO SUIT ITS PURPOSES IN OTHER CASES

Respondent seeks to answer our arguments concerning the unconstitutionality of "trial by transcript" by asserting that the subordinate referee who heard the testimony was actually the trier of fact, rather than his superior judge who read the transcript and entered the final order. Respondent concedes that the superior judge excercised independent judgment when he found on the basis of this transcript that proof beyond a reasonable doubt had been adduced. (Resp. p. 27.)

It is settled in California that the "judge", when he reads a referee's transcript in this manner, engages in de novo factfinding rather than appellate review. (In re Randy R. (1977) 67 Cal.App.3d 41; 136 Cal.Rptr. 419.) If a referee were to make a finding of fact himself, such finding would be "jurisdictionally defective" under state law which confines referees to the performance of "subordinate

judicial duty". (Ibid.; In re Damon C. (1976) 16 Cal.3d 493, 498; 128 Cal.Rptr. 172.)

It is most significant to note that following this Court's reliance upon the equally subordinate status of Maryland's juvenile Masters to reach the conclusion that a judge's overturning of finding of acquittal did not constitute double jeopardy (Swisher v. Brady (1978) ___ U.S. ____, 98 S. Ct. 2699, 2708), the Attorney General of California has urged that this Court remand a California case to the California Supreme Court for consideration as to whether state statutes should be "construed" to permit prosecutors to overturn referee acquittals, which they would characterize for that purpose as subordinate and non-binding. (California v. Jesse W. # 78-327, Petition for Ceriorari.) Having obtained the desired remand from this Court, ___ U.S. ___, 99 S. Ct. 304, the state Attorney General has filed a brief with the California court which in fact urges such construction. ("Response to Petitioner's Supplemental Brief", Cal. S. Ct. # SF 23580, filed Jan. 16, 1979.)

In another case, the state Attorney

General has been successful in obtaining a holding from the Third District Court of Appeal[4/] that a minor who has been sentenced by a referee may be pulled back into court by a "judge" who has acted on the basis of secret, ex parte arguments from the prosecution, and be re-sentenced to a state institution -- even though the minor has commenced service of the sentence ordered by the referee. (In re Jonathan S. (1979) 88 Cal.App.3d 468; ___ Cal.Rptr. ___.)

For the Attorney General of California to take the position here that the referee is really a "factfinder" after having taken a highly inconsistent position in the Jesse W. and Jonathan S. matters is, to put it mildly, disingenuous. That the referee system is susceptible to this kind of result oriented, worst-of-both-worlds manipulation underscores the need for this court to grant the writ here and determine what outer limits due process may place upon factfinding through use of subordinate judicial officers.

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4. The same court as decided the instant case.

CONCLUSION

The arguments in opposition to the petition have only served to place in sharper relief the need for resolution of the merits of the questions tendered by it.

DATED: March 2, 1979

Respectfully submitted,

QUIN DENVIR
State Public Defender

EZRA HENDON
Chief Assistant State
Public Defender

LAURANCE S. SMITH
Deputy State
Public Defender